UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs

Case No. 10-20403
HONORABLE NANCY G. EDMUNDS

BERNARD N. KILPATRICK,

Defendant.
________________________________/

DEFENDANT'S SENTENCING MEMORANDUM

Defendant Bernard Kilpatrick was indicted on charges that included the following:

Count 1: Participation in a RICO conspiracy;

Count 2: Extortion (sewer lining contract);

Count 15: Attempted extortion (Synagro);

Count 37: Subscribing a false tax return (2004);

Count 38: Subscribing a false tax return (2005); and

Count 39: Subscribing a false tax return (2007).

Trial commenced with formal jury selection on September 6, 2012, and concluded on February 15, 2013. Prior to the case going to the jury, the Government dismissed Counts 2 and 39 against Mr. Kilpatrick, leaving the jury to deliberate as to him on Counts 1, 15, 37 and 38. On March 8, 2013, the jury returned a guilty verdict on Count 38 alone-- subscribing a false tax return for 2005. The jury rendered verdicts of acquittal on Counts 15 and 39, and a "no verdict" result on Count 1.

Defendant is scheduled for sentencing on Thursday, October 17, 2013, on the sole count of conviction, Count 38.

BACKGROUND

Personal. The Court is familiar with much of Mr. Kilpatrick's personal background. Initially, and of great importance, he has no prior criminal history of any kind; in his 72 years, this tax conviction represents not just his first and only conviction, but this case represents the first and only time he ever has faced criminal charges.

Mr. Kilpatrick was born on March 17, 1941. He was raised in Detroit, and except for during his college days and a brief period in the early '70s when he taught at Western Michigan University, he has resided in Detroit his entire life. After graduating from Detroit Northern High School in 1958, he worked until getting recruited to play basketball at Ferris State University in 1961. In 1967, he graduated with a degree in business education, and as a two-time All-American athlete. He followed that up with a masters degree in education in 1975.

From 1966 until 1973, Mr. Kilpatrick taught school, first in the Detroit Public School System and then at Western Michigan University. From 1973 until 1983, he worked variously as a jobs counselor, tutor, and skills-developer for organizations like "Career Works," the "Northwest Activity Center," and the "Youth Incentive Employment Project." In 1981 he was elected Wayne County Commissioner, and worked in that position until 1990. At that time, Wayne County Executive Ed McNamara brought Mr. Kilpatrick into his administration, initially as the Director of Health and Community Services and eventually as his Chief of Staff. Mr. Kilpatrick retired from that job at the end of 2001, after his son was elected Mayor of the City of Detroit.

Mr. Kilpatrick met Carolyn Cheeks-Kilpatrick while the two were students at Ferris State. They married in 1968 and had two children, Kwame Malik (1970) and Ayanna (1972). They divorced in 1982. Mr. Kilpatrick has another daughter, Diarra, who was born in 1983.

Mr. Kilpatrick is very close to all three of his children, and his many grandchildren. For the past six years, he has been a pillar of support in particular to his son's three children as that family has endured the various investigations into the former mayor's activities. In more recent months, he has been on site with and actively assisting his daughter-in-law and his daughter, both in Texas, in caring for their children as they have struggled with employment, housing, and schools during these tumultuous times.

Instant case. As the Court knows, the case against Bernard Kilpatrick arose out of his activities as a consultant for his own company, Maestro Consulting, LLC, during his son's tenure as mayor. In its sentencing memorandum, the Government continues to beat the drum notes it sounded throughout the trial about Mr. Kilpatrick's business (he "purportedly" provided consulting services, his income "was derived from City vendors for virtually no work in return"), but the trial record is replete with descriptions of legitimate services provided by Mr. Kilpatrick to legitimate clients throughout this time. The record also contains regular references to other third-party consultants who provided the same kind of services to the same kind of vendors. There was nothing illegal or even improper about Mr. Kilpatrick providing these services merely because he was the father of the mayor.[1]

It is, of course, illegal not to pay taxes on one's income. With respect to Count 38, Mr. Kilpatrick's tax return preparers testified that they prepared his 2005 return based solely on his business records. Neither they nor S.A. Rowena Schuch identified anything improper from a tax standpoint with respect to his business revenues or expenses for 2005. However, $180,000 in deferred compensation monies received by Mr. Kilpatrick that year did not go through his business accounts, did not get reported by the preparers on his tax return, and therefore did not get taxed. Mr. Kilpatrick signed the return anyway and, while counsel argued that insufficient evidence was adduced at trial to prove that he did so knowingly, the jury found otherwise. For sentencing purposes, these facts have been adjudicated.

In addition, though, the Government now seeks to have Mr. Kilpatrick held responsible for an additional $100,000 in allegedly unreported income, representing cash tendered by Karl Kado in June

[1] Counsel does not wish to belabor his rebuttal of the Government's assertions in these regards, since they have little if anything to do with the tax count on which Defendant is being sentenced. However, as examples of the evidence on which counsel relies, the Court will recall Jon Rutherford testifying as to his use of multiple consultants, Defendant's qualifications, and specific services performed *(Tr. 10/19/12, pp 13-18)*; Derrick Miller testified to services Defendant provided to clients, including Karl Kado and James Rosendall, and to the plethora of consultants providing similar services *(TR 1/8/13, pp. 95-96, 103-107; 1/10/13, pp. 34-44.)*; even Karl Kado *(see infra)*, Marc Andre Cunningham *(TR 12/21/12, pp. 81-83, 147-148, 149)*, and James Rosendall testified to Defendant providing services *(TR 1/18/13, pp 32-35, 38-40)*. All were cooperating Government witnesses who had no incentive to testify favorably on these points for Defendant, but did so, albeit reluctantly at times.

2005. This cash was not part of the Government's theory at trial as an example of income that Defendant knowingly and willfully failed to report, nor was it included in S.A. Schuch's calculations of underreported income or tax loss for 2005. The defense will explain more completely below, in the "Sentencing Guidelines" section of this memorandum, why this cash should not be attributed to Defendant as income, but the reason primarily is that Mr. Kado himself testified repeatedly that the cash was not intended for Defendant.

SENTENCING GUIDELINES SCORING OBJECTIONS

Controverted Item 1, 2, 3, and 5 (Paragraphs 12-13, 17, 18, 25, 59): Defendant raises two objections to the scoring of his sentencing guidelines. First, he objects to receiving a score of 16 for his base offense level, under U.S.S.G. § 2T1.1(a)(1); he argues that this score should be 14. Second, he objects to the 2-level enhancement of that base offense level for unreported income that was criminally derived, under U.S.S.G. § 2T1.1(b)(1).

1. Base Offense Level. The base offense level is based on the amount of tax loss, according to the tax loss table found at U.S.S.G. § 2T4.1. For a tax loss of over $80,000, the level is 16; for a loss between $30,000-$80,000, the base offense level is 14.

In Defendant's case, the probation department asserts that Defendant "failed to declare a $100,000.00 cash payment from Karl Kado." Probation also asserts, "It is the probation department's understanding that [Defendant] advised Kado in a recorded conversation that he spent the money from Kado at a casino." (PSIR, as revised, par. 12.) As a result, according to this analysis, the tax loss from the previously-described $180,000 in unreported deferred compensation payouts, plus the loss from Kado's $100,000, exceeds $80,000, yielding a base offense level of 16. The analysis is flawed, however, because Mr. Kado himself testified, repeatedly, that the $100,000 he gave to Defendant was for his son's re-election campaign, not for Defendant, and the probation department's "understanding" that Defendant spent it at the casino is in error.[2]

On at least three occasions during its direct examination of Mr. Kado, Government attorneys asked him about the purpose behind the $100,000. At *TR. 12/3/2012, p. 43*, we find the following:

> Mr. Bullotta: *Why did you pay Bernard Kilpatrick $100,000 in June of '05?*
>
> Mr. Kado: *I paid him 10 -- $100,000, I said, "This money, take it for the election to help the mayor get elected * * *."*

Next, at p. 76 of the same transcript:

> Mr. Bullotta: *Okay. I want to stop you there, Mr. Kado, stop the tape there. When you said right at the end of that tape, "Two-oh-five, two-oh-five I gave you $100,000 for the election," and Bernard Kilpatrick's response, "Oh, yeah," what is that referring to?*
>
> Mr. Kado: *I wanted to help the mayor get elected, so I give $100,000 to Bernard. I said, "Go spend it on the election so he will be mayor again.*
>
> Mr. Bullotta: *Is that the $100,000 you've already testified about today?*
>
> Mr. Kado: *Yes.*

Finally, we find this exchange between the Government and Mr. Kado, at p. 92 of the same transcript:

[2] Counsel can only speculate that the source of this "understanding" is the Government, in light of its similar (and similarly wrong) assertion at p. 5 of its sentencing memorandum.

Mr. Bullotta: *But the $100,000, you said that you, you testified that you gave it to [Defendant] for the campaign, is that right?*

Mr. Kado: *Yes.*

Mr. Bullotta: *Did he ask for the $100,000, or did you just give him that?*

Mr. Kado: *No.*

Mr. Bullotta: *You just came out of the blue and gave it to him?*

Mr. Kado: *Yes.*

Quite clearly, the $100,000 tendered by Mr. Kado to Bernard Kilpatrick was not for Bernard, but rather for Kwame Kilpatrick's re-election campaign.[3]

The probation department acknowledges Mr. Kado's testimony that the money was intended for Kwame Kilpatrick, not Bernard. However, because it was led to believe that Bernard spent the money at a casino, the department believes the cash still is attributable to him as income. The department does not describe any evidence underlying its "belief" in this regard. Again, however, this likewise is the Government's theory in its sentencing memorandum, and the Government cites both to Mr. Kado's trial testimony, and to a recorded

[3] Defense counsel acknowledges that, in closing argument, he explained the $100,000 tender as payment on back amounts owed to Defendant by Kado. In his own defense, counsel was responding to the Government's argument that Defendant had extorted Mr. Kado, with respect to any and all amounts he received. In addition, closing argument occurred more than two months after Mr. Kado's testimony. In re-reading Mr. Kado's testimony since the verdict in light of the PSIR, it is apparent that counsel erred in closing argument.

conversation between him and Bernard Kilpatrick in support. Neither provide that support.

The recorded conversation is the main reference point in this analysis. It took place on February 8, 2008, at a restaurant, and in that conversation one finds the following passage:

> BK: ** * * you was under, you went and hid under a rock, man I couldn't find you. And then either you came out of the clear blue, and say here, that's for the campaign, I was shocked. Cause I woulda been buggin' you about ...*
>
> Kado: *Because the point was this, he needs that money, definitely he was losing.*
>
> BK: *That's right.*
>
> Kado: *And you need that money. I told him spend that money you make a hundred times more ...*
>
> BK: *And I did. Shit.*
>
> Kado: *Instead of losing you keep it you go to casino spend it there, the guy loses, the Mayor loses what are you going to get for it?*
>
> BK: *Right, right.*
>
> Kado: *Nothing.*
>
> BK: *I spent that money and some of mine. I found some money to put in the campaign.*
>
> Kado: *Are you sorry?*
>
> BK: *No, I'm not sorry.*
>
> Kado: *Good, that's the point.*

(See Govt. COBO 16A, pp. 17-18.)

The Government wants the Court to interpret this exchange as an acknowledgment by Defendant that he spent Kado's $100,000 at a casino. However, that is not what Defendant said, nor is it even what Mr. Kado suggests. Mr. Kado says that he provided the money for Kwame Kilpatrick's campaign. He then sets up a counterpoint: if the money had been spent at a casino, and the Mayor lost, the money would be wasted, as compared with spending it as intended on the campaign and the Mayor winning re-election. ("What are you going to get for it," meaning, at the casino, is a future-tense statement, and does not mean "you spent my money at a casino and what did you get for it?") The balance of the exchange is just as instructive: Bernard Kilpatrick says that he spent Mr. Kado's money "and some of mine. I found some money to put in the campaign." Clearly, they are discussing campaign expenditures, not casino expenditures. And the final "are you sorry," "no I'm not sorry," "good, that's the point" exchange can only be reasonably interpreted as referring to campaign spending. (Why would Mr. Kado think it "good" for Bernard Kilpatrick to take his campaign contribution and blow it gambling?)

The point is made even more clearly when one reviews Mr. Kado's trial testimony, *TR. 12/3/13 at pp. 83-85*. There, the Government asked him a series of questions about what happened to his $100,000. First, Mr. Kado testified "[Defendant] went to Greektown Casino, all the money went there." Defense counsel objected, which objection the Court sustained. The Government tried again, "did you learn something [about what happened to the money?}" Mr. Kado replied, "No, no, I assumed that --." The Court interrupted, "no no no." The

Government persisted: "Did Bernard Kilpatrick tell you what happened to the $100,000." Mr. Kado replied, "No." Finally, after a few more tries, the Government asked, "He didn't say that it went to the campaign, did he?" Mr. Kado answered, "I don't know." (Emphasis supplied.)

The restaurant conversation, reasonably interpreted, confirms that Mr. Kado gave Bernard Kilpatrick money to be applied to his son's successful re-election campaign, and that Bernard in fact applied it there (along with some of his own money). The trial exchange reveals that the "he spent it at the casino" theory is at best speculation by Mr. Kado, and, more likely, fiction. The $100,000 tendered by Mr. Kado was for Kwame Kilpatrick, not Bernard Kilpatrick, and should not be attributed as income to Bernard Kilpatrick.

It bears noting that the Government, through S.A. Schuch, utilized the "specific item" method of determining understated income for tax year 2005. *TR. 1/3/13, p. 147.* As the name implies, that method involves identifying specific items of income not included in the taxpayer's return. Agent Schuch heard Karl Kado's testimony on December 3, 2012, and heard and saw the exhibits introduced during that testimony, a full month prior to her January 3, 2013 testimony about Mr. Kilpatrick's 2005 tax return. On her own direct examination, she even was asked specifically about the $100,000 cash tender to Mr. Kilpatrick. Nonetheless, she did not identify that money as a specific item of unreported income in connection with the 2005 tax return, in testimony or in her exhibits. *TR. 1/3/13, pp. 144-148.* The reasonable conclusion to be drawn from this omission is that Agent Schuch did not view that tender as income to Bernard Kilpatrick.[4]

Because the $100,000 tendered by Karl Kado was not for Defendant but rather for Kwame Kilpatrick, and because there is no evidence that Defendant in fact used the money for his own purposes, it should not be attributed to him as income. The IRS investigators, who were well aware of this tender, apparently agreed, at least at the time of trial. Defendant's Base Offense level is 14, based on a tax loss, as computed by Agent Schuch at trial, of $62,212.24.

2. *Enhancement for income derived from criminal activity.*

In paragraph 13 of the PSIR, the probation department scores 2 additional offense level points by characterizing the $100,000 from Karl Kado as being "from criminal activity." The PSIR does not describe in what manner this money was derived from criminal activity. The Government agrees with the scoring, however, relying on the fact that Mr. Kado characterized his payments to Bernard Kilpatrick as extortion. (*Govt. Sentencing Memorandum, p. 11.*)

Mr. Kado's testimony on direct examination, cited by the Government, that his payments (writ large) to Defendant were "extortion" cannot be taken at face value. The next day, on cross-

[4] The Government submitted Agent Schuch's affidavit as Exh. A to its sentencing memorandum. In the affidavit, Agent Schuch explains why she did not identify this money as unreported income by saying that "for purposes of trial the specific item method of proof was used." This explanation is a *non sequitur*. The $100,000 is as much a "specific item" as was the other $180,000. Even the the Government refers to it that way, at p. 6 of its sentencing memorandum. ("[T]he $100,000 amount should be included in his tax liability for 2005 as a specific item * * * which was not included in his tax liability computation * * * ." (Emphasis supplied.))

examination, he reluctantly acknowledged asking Bernard Kilpatrick to assist him with various matters, including keeping Lou Pavledes at City Hall *(TR. 12/4/13, p. 16)*, acquiring the Cobo Hall janitorial contract and electrical contracts *(Id., p. 18)*, and keeping away a potential competitor for the Cobo Hall electrical contract *(Id., p. 24)*. He also acknowledged an understanding that he would pay Bernard in exchange for those services. *(Id., p. 16.)*

Mr. Kado's acknowledgments on cross-examination that he paid Defendant for services rendered is consistent with statements by him in the above-described February 8, 2008 recorded conversation. For instance, at the very beginning of that recording we hear Mr. Kado saying to Defendant, *"The work that I did there, at, at Cobo Hall, was part of the agreement that I had with you."* *(Govt. Exh. COBO 16A, p. 1.)* A little later, while discussing Bernard's anticipated assistance in Mr. Kado getting paid back amounts owed him by the City, Bernard says, *"It's just that they can't do that legally. I'm gonna meet with Amru Monday."* Mr. Kado replies, *"That one, that one, all what I am concerned about electric. Electric we made it together you and me."* *(Id., p. 8.)* In these exchanges, Mr. Kado acknowledges working with Bernard Kipatrick in obtaining contracts.

Finally, Derrick Miller, a central cooperating witness for the Government, testified on direct examination that Defendant had a consulting relationship with Karl Kado, that in fact Mr. Kado was one of Defendant's "best clients," and that Defendant performed services for Mr. Kado. *(TR. 1/7/13, pp. 95-96; 1/10/13, pp. 40-41.)* This, in turn, is consistent with various Government text message exhibits between Defendant and Mr. Miller. *(See Govt. COBO-3-7, Defense DCOBO 10A, 10B.)*

The upshot of this testimony, and these exhibits, is that Mr. Kado was a consulting client of Defendant's. The Government's argument that Defendant extorted monies from Mr. Kado is belied by the proofs. Accordingly, he should not receive the 2 point enhancement under U.S.S.G. 2T1.1(b)(1).

Conclusion: The Court should score Defendant's Base Offense Level at 14, and should not score the 2-point enhancement for unreported income derived from criminal activity. His Total Offense Level is 14 which, combined with his Criminal History Category I, yields a guidelines range of 15-21 months, not 27-33 months as scored by the probation department and urged by the Government.

OTHER OBJECTIONS TO THE PSIR--NON-RELEVANT CONDUCT

Controverted Item 4 (Paragraphs 27, 28, 30-32): Defendant objected to various descriptions of "offense behavior not part of relevant conduct," which the Government claimed at trial reflected acts of extortion, bid-rigging, or other illegal "steering" of City contracts. Undersigned counsel rests on his statement of objections as to why the Court should not attribute this behavior to Defendant. Ultimately, it must be kept in mind that the jury acquitted Mr. Kilpatrick of extortion and the Government dismissed the other such count. Furthermore, the jury did not convict Defendant of conspiring to commit RICO. As stated in his objections, proofs of this alleged conduct were not sufficient, either entirely lacking or so ambiguous as to not support a conviction, and should not be ascribed to

Defendant even under a preponderance standard for sentencing purposes on the tax count of conviction.

ARGUMENT REGARDING SEC. 3553(A) FACTORS, AND FOR VARIANCE

The Court is thoroughly familiar with the factors it is to consider in sentencing Defendant, pursuant to 18 U.S.C. § 3553(a), including the directive that the Court impose a "sentence sufficient, but not greater than necessary" to accomplish the objectives of sentencing. Counsel will address each of the factors relevant to this case, in order.

1. *Nature and Circumstances of the Offense and the Offender.*

As noted, Defendant is a 72 year old man before the Court on his first-ever conviction. The facts in evidence underlying the jury's verdict, as explained by Agent Schuch, are that he failed to disclose $180,000 in deferred compensation benefits that he received during the 2005 tax year. There is no suggestion that the deferred compensation benefits had anything to do with the alleged RICO conspiracy, or the extortion charges, or any other "Kilpatrick enterprise" activity, none of which Defendant was convicted of anyway. Further, as noted by the probation department, the amount of tax loss is relatively low (even considering its attribution to Defendant of another $100,000 in income from Karl Kado, which the defense has argued above should not be counted). *(PSIR, par. 77.)* All of these circumstances support a variance in this case.

The Government urges the Court to punish Defendant in light of his alleged involvement in the RICO conspiracy and for extortion activity on which he was tried, but not convicted. It relies on testimony by Karl Kado, Marc Andre Cunningham, and James Rosendall in support.[5] The Government also continues to assert that Defendant "rarely, if ever, provided services" for the payments he received from them. As previously described, each of those cooperating witness eventually, albeit reluctantly, acknowledged on the trial record that they, like many other clients, requested Defendant's help and that he provided valuable services to them. The Court should reject the Government's entreaty that these allegations be considered for sentencing.

The Government also argues that the tax crime is emblematic of Defendant's "greed." One might postulate that virtually anyone who is guilty of this offense is motivated at least in part by greed. It is no reason for the Court not to consider a variance.

Another reason militates in favor of the Court considering a variance in connection with this sentencing factor. Research relating to mortality rates of elderly prisoners who enter a prison environment later in life suggests that those rates are significantly higher for this specific population. The U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics conducted a study relating to medical causes of death in prison. The outcome paints a dismal picture of the mortality rate for an elderly inmate,

[5] The Government even continues to argue that Defendant improperly "solicited additional payments" from Karl Kado in connection with Mr. Kado's request for Defendant's assistance in collecting amounts owed to him by the City in 2008. This theory was thoroughly debunked by Kado's own acknowledgment that he solicited Defendant, not vice versa, that he proposed the compensation arrangement, not vice versa, that Defendant's "compensation" was contingent on obtaining the amounts Kado sought, that the mayor vigorously contested his father's efforts, and that he was entirely unsuccessful in obtaining the relief that Kado sought--and so he received nothing from Kado.

especially one who enters the environment at an advanced age versus an inmate who is incarcerated at a younger age and ages within the prison environment.

> "Mortality rates rose dramatically with age. The death rate of inmates age 55 and older (1973 per 100,000) was over 3 times higher than that of inmates age 45-54 (566 per 100,000), and 11 times higher than those age 35-44 (177 per 100,000). Inmates age 45 or older comprise 14% of State prisoners from 2001 to 2004, but accounted for 67% of all inmate deaths over the same period."

Christopher J. Mumola, *Medical Causes of Death in State Prisons, 2001-2004*, U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, Data Brief, January 2007, NCJ216340.

Undersigned counsel knows that this Court will not hesitate to sentence an elderly person to a significant prison term where it is found to be appropriate. In this case, however, where the crime is serious but non-violent and economic, it seems less appropriate to subject the elderly person to the substantially higher mortality rates cited above where alternatives are available.

2. *"Just punishment" that promotes respect for the law.*

As noted by the probation department, given the relatively low tax loss "[a] sentence at or below the guideline range in this case would reflect the seriousness of the offense, promote respect for the law and provide just punishment." (PSIR at par. 77; emphasis supplied.)

3. *Afford deterrence/protect the public.*

"Deterrence" is a concept usually applied to the anticipated impact of a sentence on others who might contemplate similar criminal activity. It has been observed that deterrence has more to do with the "certainty" of punishment rather than its "severity." *See, e.g., United States v. Bannister*, 786 F. Supp. 2d 617, 660 (E.D. N.Y., 2011), and materials cited therin. Regardless of the sentence imposed by this Court, it seems likely that a similarly situated first-offender familiar with this case would find sufficient deterrent effect simply by the ordeal and its outcome. The probation department agrees: "Any sentence imposed by the Court would afford adequate deterrence to criminal conduct." (PSIR, par. 77.)

"Protection of the public" (sometimes referred to as "specific deterrence," as opposed to "general" deterrence discussed just above) usually refers to the impact of sentence on the defendant, and future recidivism. Again, Mr. Kilpatrick is 72 years old and this is his first offense. Studies consistently have shown that recidivism declines significantly as age increases. *See, e.g., Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines*, at 12, 28 (2004) http://www.lb5.uscourts.gov/ArchivedURLs/Files/08-10643(1).pdf (rate of recidivism of persons over 50 in criminal history category I measured at 6.2%). Furthermore, a pre-guidelines study found little if any difference in recidivism rates for white collar offenders regardless of whether the offender was sentenced to probation or incarceration. *See* David Weisburg et al., *Specific Deterrence in a*

Sample of Offenders Convicted of White-Collar Crimes, 33 Criminology 587 (1995)

Given this, protecting the public from future harm from Defendant seems a remote concern for sentencing purposes. As observed by the probation department, "any sentence imposed would protect the public from further crimes of the defendant." (PSIR, par. 78.)

4. *The kinds of sentences available; restitution.*

In this case, available sentences include probation, a split sentence (probation plus a lesser form of restraint, like home confinement), or traditional incarceration for up to a maximum term of three years. A less-than-guidelines sentence would require a variance, but such a sentence is no less "available" for that reason. Furthermore, as the probation department observes, a variance may be accompanied by special conditions including those requiring Defendant to repay the tax loss in accordance with a payment arrangement schedule. (PSIR, par. 81.)

5. *Avoid unwarranted sentencing disparities.*

The Government argues that there are no similarly-situated defendants in this or related cases, and they probably are correct--all other defendants in the same or similar class acknowledged involvement in, or were convicted of, offenses that were much worse. The following three whom are most similar make the point.

Jon Rutherford, who testified in this case, was described by the Government to have unlawfully diverted to his personal use over

$2,000,000.00 in local government and grant funds, avoiding just under $900,000 in taxes. *(See U.S. v. Jon Rutherford, Case No. 06-20207, Doc. #52 "Government Sentencing Memorandum.")* He pleaded guilty to a general conspiracy count (including conspiracy to file false tax returns and avoid taxation) and was sentenced to 21 months incarceration.

Another example is Lou Pavledes, former director of Cobo Hall. Mr. Pavledes received hundreds of thousands of dollars in bribes from Karl Kado beginning in the late 1990s (during the Archer administration) and continuing through 2003, on which he paid little or no income tax. He was permitted to plead to illegal "structuring" involving only a portion of the bribes received. He was sentenced to a below-guidelines sentence of 14 months, on guidelines that were already much reduced based on the lesser conduct to which the Government permitted him to plead guilty.

The most stark example is Karl Kado himself, who acknowledged paying the hundreds of thousands of dollars in bribes to Lou Pavledes, as well as additional bribes to Glenn Blanton and others in order to protect his Cobo Hall empire. In addition, he was found to have avoided taxes in more years than did Defendant, involving more taxes lost by the Government. He was permitted to plead guilty to a single tax count and sentenced to probation.

It may be true that these defendants provided cooperation to the Government in connection with the instant case. Nonetheless, their cooperation did not result in the count of conviction on which Bernard Kilpatrick faces sentencing. Moreover, regardless of their level of cooperation, given their corresponding deep level of criminal involvement well beyond that for which Mr. Kilpatrick was found responsible it would create an unjust disparity to sentence him differently simply because he did not similarly cooperate.

Conclusion: Bernard Kilpatrick stands convicted of a single tax offense. It is a felony, and it is serious, but it is his only conviction in his 72 years and as noted by the probation department it is in a relatively low amount that can be repaid. It would be reasonable and consistent with a sentence that is "sufficient but not greater than necessary" to sentence Defendant to a term of probation, with whatever special conditions the Court finds appropriate, or a minimal term of incarceration. Counsel asks this Court to grant Defendant a variance from the sentencing guidelines and impose such a a sentence.

Respectfully submitted,

Dated: October 15, 2013

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on October 15, 2013, he electronically filed *Defendant's Sentencing Memorandum*. Notice of this filing will be sent to all counsel of record by operation of the Court's electronic filing system.

Dated: October 15, 2013

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